

STATE OF MICHIGAN
COURT OF APPEALS

COLLEEN CONROY MANSOUR,

Plaintiff-Appellee/Cross-Appellant,

V

JOHN MICHAEL MANSOUR,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

April 26, 2011

No. 295717

Genesee Circuit Court

LC No. 07-275134-DM

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant John Michael Mansour appeals as of right from the trial court's judgment of divorce. On appeal, defendant asserts that the trial court erred in calculating the amount of spousal support, alimony, child support and attorney fees that defendant was required to pay. Additionally, plaintiff Colleen Conroy Mansour cross-appeals the trial court's judgment of divorce. On cross-appeal, plaintiff asserts that the trial court erred in calculating defendant's income and, consequently, miscalculated the child and spousal support awards. Plaintiff further argues that the trial court's award of attorney fees in her favor constituted an abuse of discretion because it was inadequate. We affirm in part, vacate in part and remand for further proceedings.

Plaintiff and defendant were married on May 28, 1988. The marriage produced four children. During the course of the marriage, the parties agree that defendant earned a significant amount of money. While defendant's income was initially dependent on real estate development, he subsequently began to invest in a variety of business ventures. The parties experienced marital difficulties and plaintiff filed for divorce in October 2005 after learning that defendant had been having an affair. However, the case was dismissed when defendant agreed to end the affair and the parties decided to repair their marriage. Subsequently, defendant alleges that his income and the value of his various assets significantly decreased as a result of the crash of the real estate market, which resulted in defendant filing for bankruptcy. Plaintiff again filed for divorce on May 11, 2007 after discovering that defendant had not ended the affair.

The parties eventually proceeded to a bench trial. At the trial, plaintiff pursued the theory that defendant utilized the time between the two divorce filings to hide assets and engage in "divorce planning." Consequently, plaintiff urged the trial court to impute defendant with an annual income of \$350,000 and to conclude that defendant had hidden millions of dollars in

assets. In contrast, defendant denied that he had any hidden assets. He further asserted that while he made \$65,000 annually at the outset of the trial, he was given a raise to \$105,000 annually by the time the trial ended.

At the close of trial, the court issued a written opinion, in which it concluded that defendant had not been intentionally bypassing opportunities to increase his income. When referencing child support, the court stated that defendant made approximately \$65,000 per year. However, in addressing defendant's motion for new trial, the court stated that defendant actually made over \$100,000 per year and that the figure in the initial opinion was merely a number for the Friend of the Court to use in calculating child support. The court stated that it would not impute additional income to defendant, but further concluded that defendant exhibited bad faith that was perhaps indicative of an effort to hide assets. The court did not state an exact or general amount of assets to which it believed defendant had access.

On appeal, defendant first argues that the trial court erred in admitting the expert testimony of John Alfonsi, a forensic accountant who offered testimony regarding plaintiff's theory of hidden assets. We disagree.

This Court reviews a trial court's decision to admit the testimony of an expert for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when a court's decision falls outside the range of principled outcomes. *Woodard*, 476 Mich 557. Admitting inadmissible evidence constitutes an abuse of discretion. However, even when this Court determines that expert testimony was wrongly admitted, a party is not entitled to relief unless it can demonstrate that the abuse of discretion affected a substantial right or was inconsistent with substantial justice. *Craig*, 471 Mich at 76.

Pursuant to MRE 703, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." It further provides, "[t]his rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter." In the present case, defendant asserts that Alfonsi based his opinion regarding defendant's finances on evidence that was not in the record.

Defendant claims Alfonsi reviewed over 2400 pages of documents, which were described on the nine page list he prepared and which were not all admitted as evidence. Defendant's assertion, while accurate, is not relevant to the required analysis. As described above, Alfonsi provided the trial court two separate lists: the nine-page list described the documents he reviewed while the two-page list described the documents he relied upon in forming his opinion. MRE 703 does not require each piece of evidence reviewed by an expert to be admitted as evidence. While it may be true that many of the items that Alfonsi reviewed were inadmissible, defendant must demonstrate that the documents that formed the basis of Alfonsi's opinion were inadmissible.

To contest Alfonsi's claim that he only relied on evidence that was described on the two page list, defendant cites a portion of Alfonsi's testimony where he stated "I took into consideration all of the information or all of the sources that were provided to me." Alfonsi was

later asked what he looked at before reaching his conclusions. He proceeded to describe some evidence that had not been admitted at trial. However, although Alfonsi stated that he considered or looked at all of the information provided to him, it does not necessarily follow that all of that information was used in forming the basis of his opinion. Alfonsi's general testimony regarding "looking" at certain documents does not contradict or negate his specific testimony regarding which evidence he relied on.

Just as defendant cites to Alfonsi's testimony, he also cites to plaintiff's counsel's statements regarding the evidence that Alfonsi utilized. During the trial court's discussion regarding the propriety of Alfonsi's testimony, plaintiff's counsel stated that, "with the exception of a couple tax schedules and one or two other documents," all of the evidence that Alfonsi relied upon had been admitted into evidence. Defendant argues that the statement establishes that Alfonsi's testimony was improper under MRE 703. We disagree. While defendant correctly attributes counsel's admissions to his client, he fails to acknowledge that the court was provided with a very specific list of documents by the witness at issue. Although plaintiff's counsel may have stated that there were a few documents relied upon that were not admitted as evidence, defendant has failed to identify any particular document on Alfonsi's two-page list that was not admitted as evidence. Where Alfonsi explicitly informed the court of the evidence that formed the basis of his opinion, it would be improper to conclude the court abused its discretion when defendant has failed to demonstrate that any of that evidence had not been admitted as testimony.

Next, defendant and plaintiff each assert that the trial court erred in calculating the proper amount of spousal support and alimony. Defendant asserts that each of those awards was excessive because the trial court failed to appreciate that defendant was insolvent and did not have the ability to pay the awards as calculated. In contrast, plaintiff asserts that the awards were each deficient because the trial court failed to impute defendant with the proper amount of income. We conclude that the trial court failed to make necessary factual findings prior to calculating the awards in question. As a result, the court was unable to accurately determine the proper amount of support and this matter must be remanded.

This court reviews a trial court's award of alimony for an abuse of discretion. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). Any factual findings made by the court are reviewed for clear error. *Id.* Consequently, this Court presumes that the trial court's findings were accurate and the challenging party must leave this Court with a definite and firm conviction that a mistake was made. *Id.* at 433. If the trial court did not commit clear error in making its factual findings, this Court must determine whether the court's ruling was fair and equitable. *Id.* "The trial court's decision regarding spousal support must be affirmed unless [this Court is] firmly convinced that it was inequitable." *Id.*

"The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party. Alimony is to be based on what is just and reasonable under the circumstances of the case." *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000) (internal citation omitted). In determining the proper amount to be awarded, the trial court is to consider the following factors:

- (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded

to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [Berger v Berger, 277 Mich App 700, 727; 747 NW2d 336 (2008) (internal citations omitted).]

“The trial court should make specific factual findings regarding the factors that are relevant to the particular case.” *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003).

In the present case, we find that the trial court failed to make necessary findings regarding defendant's ability to pay spousal support and alimony in gross. As described above, the trial court appears to have made conflicting findings regarding defendant's income. Even if this Court concludes that the trial court properly found defendant to make \$105,000 annually, that amount of income does not support the amount of spousal support and alimony in gross calculated by the trial court. Consequently, it is clear that the trial court's calculations were based on its conclusions regarding defendant's access to hidden assets. However, the trial court failed to state with any specificity the amount of assets that it believed defendant had access to. Absent such a finding, the court's calculations of spousal support and alimony in gross cannot be affirmed because this Court is unable to state whether the awards were just and reasonable, whether they resulted in a proper balance of the parties' incomes and whether defendant has the ability to pay.

Next, the parties dispute whether the trial court properly calculated the child support award. Plaintiff asserts that the court improperly calculated defendant's income and that the child support formula resulted in a deficient payment. Defendant contends that the trial court applied the proper income figure when calculating child support. However, defendant further asserts that the trial court erred in holding him responsible for his children's private school tuition. Once again, we conclude that it is necessary to remand this matter, as the trial court failed to make a clear finding regarding defendant's income and his ability to pay the child support award.

“Whether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child support formula are reviewed de novo as questions of law.” *Peterson v Peterson*, 272 Mich App 511, 516; 727 NW2d 393 (2006).

In determining a party's child support obligations, “a trial court must presumptively follow the Michigan Child Support Formula.” *Stallworth v Stallworth*, 275 Mich App. 282, 284; 738 N.W.2d 264 (2007). In the process of applying that formula, the trial court determined that defendant's annual income at the time of trial was \$65,000. Plaintiff asserts that the trial court erred in utilizing that figure and, as a consequence, defendant was not required to pay the proper amount of support. According to plaintiff, the trial court should have utilized the figure of \$350,000 which represents the figure plaintiff believes defendant could have made had he not willingly avoided employment.

The 2008 Michigan Child Support Formula Manual provided, “When a parent is voluntarily unemployed, or has an unexercised ability to earn, income includes the potential income that a parent could earn, subject to that parent's actual ability.” 2008 MCSF 2.01(G) (emphasis in original). Section 2.01(G)(1) further provides, “The amount of potential income imputed should be sufficient to bring that parent's income up to the level it would have been if the parent had not voluntarily reduced or waived income.”

In arguing that the trial court erred in failing to impute defendant with a larger income, plaintiff primarily cites to defendant's previous professional accomplishments and his history of earning substantial sums. Plaintiff further cites the testimony of Charles Mirisciotti, who is a vocational rehabilitation consultant and testified that someone with defendant's experience and education should be able to earn a minimum of \$200,000 annually. Plaintiff argues that defendant did not actively search for employment. Defendant, in contrast, testified that he had looked for employment and that he was unable to find anything until the bench trial was underway. The trial court, after observing defendant's testimony, found that defendant was credible regarding his employment search and was not voluntarily unemployed. The record does not establish that the trial court's finding was erroneous. Although it is true that defendant was historically very successful, his primary earnings were generated through real estate developments and investments. As defendant testified at trial, and what is essentially common knowledge, the real estate market has collapsed in recent years. It was not clearly erroneous for the court to find that defendant was not voluntarily sacrificing earnings when defendant's area of expertise ceased to be profitable at the time the marriage was dissolving.

Although we conclude that the trial court did not err in failing to impute defendant with an income of \$350,000, it does appear that the trial court nonetheless erred in determining that defendant's income was \$65,000 annually. As stated above, defendant explicitly testified that he recently obtained employment from which he earned over \$100,000 in salary and additional compensation that included allowances for enumerated expenses for which no monetary value was placed on the record. The court acknowledged that testimony in its order denying defendant's motion for a new trial. By failing to utilize defendant's actual income, the trial court failed to properly apply the Child Support Formula. On remand, the trial court is instructed to make a factual finding regarding defendant's annual income and to use that figure in calculating the proper amount of child support.

As described above, defendant asserts that the trial court had no legal basis for ordering him to pay for his children's school tuition. In so arguing, defendant fails to recognize the statutory definition of “support”, which appears at MCL 552.602(ee)(i) and provides that support may encompass educational expenses. Plaintiff accurately cites two instances in which this Court has provided that child support payments may be utilized for private school tuition. See *Edwards v Edwards*, 192 Mich App 559; 481 NW2d 769 (1992); *Arndt v Kasem*, 135 Mich App 252; 353 NW2d 497 (1984). Consequently, it is clear that tuition expenses are one of the many factors that a court may consider in crafting a child support award. However, the trial court failed to give any indication that defendant could actually afford to pay that portion of the support award, which amounted to \$18,000 per year. When considering the trial court's conflicting findings regarding defendant's income along with the court's failure to state the assets to which defendant had access, we cannot conclude that the trial court properly calculated the child support award.

Next, plaintiff and defendant each assert that the trial court erred in determining the amount of attorney fees to which plaintiff was entitled. Defendant asserts that the finding was in error because he has no ability to pay. Plaintiff asserts that the award was inadequate and should have also included sanctions.

This Court reviews a trial court's decision regarding attorney fees for an abuse of discretion. *In re Temple*, 278 Mich App 122, 128; 748 NW2d 265 (2008). Consequently, the trial court's decision must be affirmed unless it falls outside the range of principled outcomes. *Woodard*, 476 Mich 557. Plaintiff also challenges the trial court's decision regarding sanctions. "We review for clear error a trial court's determination whether to impose sanctions under MCR 2.114." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). "A decision is clearly erroneous when, although there may be evidence to support it, this Court is left with a definite and firm conviction that a mistake was made." *Id.*

Pursuant to MCR 3.206(C)(2)(a), a party seeking attorney fees in a divorce action must demonstrate that it cannot bear the expense associated with the action and that the other party has the ability to pay the fee. Consequently, this Court has stated that attorney fees in a divorce case are awarded "only as necessary to enable a party to prosecute or defend a suit." *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). This Court has further stated that a party should "not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support." *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). In this Court's recent decision in *Myland v Myland*, ___ Mich App ___; ___ NW2d ___ (2010) at slip op 6, the court addressed a situation in which the trial court refused to award attorney fees in a divorce case in which the court found neither a showing of egregious conduct nor wasteful litigation. In reversing the trial court, this Court explained:

it was incumbent upon the trial court to consider whether attorney fees were necessary for plaintiff to defend her suit, including whether, under the circumstances, plaintiff would have to invade the same spousal support assets she is relying on to live in order to satisfy her attorney fees, and whether, under the specific circumstances, defendant has the ability to pay or contribute to plaintiff's fees. [*Id.*]

Furthermore, in addition to determining financial need and the ability to pay, a trial court in a divorce action is also required to conduct a hearing to determine the reasonableness of the requested fees. "The trial court may not award attorney fees . . . solely on the basis of what it perceives to be fair or on equitable principles." *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005).

In the trial court's opinion that preceded the judgment of divorce, the trial court stated that plaintiff demonstrated her need for financial assistance and that the record established that defendant had the ability to pay some amount of the attorney fees. The court awarded \$7,500 for attorney fees "solely based on time expended in court for motions and trial." The court did not make a finding on the record as to what portion of the total fees incurred that the plaintiff herself could afford to pay.. Absent such a finding, we cannot conclude that the trial court properly followed the requirements of MCR 3.206(C)(2)(a).

Regarding plaintiff's assertion that the trial court erred in denying her request for sanctions, we disagree. Plaintiff asserts that sanctions were proper under MCR 2.114(E), which provides for sanctions where a party or its attorney signs a document that is inaccurate or is intended to cause needless delay or cost. Plaintiff likewise asserts that sanctions are proper under MCR 3.206 (C)(2)(b), which allows for the recovery of fees in a divorce case where the fees were the result of a party's noncompliance with a court order. Plaintiff alleges that sanctions should have been awarded because defendant failed to respond to numerous discovery requests. Plaintiff further implies that defendant should be sanctioned for allegedly engaging in "divorce planning" and hiding substantial assets from the trial court.

In support of her argument that defendant improperly signed documents and failed to comply with discovery orders, plaintiff cites a multitude of discovery motions that she filed in the trial court. Plaintiff asserts that defendant failed to comply with the orders, but fails to attach the orders or note the docket entries that memorialize those orders. At oral argument, defendant acknowledged one motion for discovery that was filed by plaintiff but disputes his non-compliance. This Court has not located any trial court order that was issued in response to any of the alleged discovery motions. We acknowledge that the record in this case is voluminous and that this court received supplementary records from the trial court in recent weeks. The parties have each alluded to some records that we do not have in our possession. Therefore, while plaintiff's claims may be true, they simply cannot be verified. As a result, it would be improper to conclude that the court committed clear error in denying the requested sanctions.

Regarding plaintiff's implications that defendant hid assets and is liable for sanctions as a consequence, the reasoning of her argument is unclear. We assume that plaintiff believes that defendant, in the process of misleading the court regarding his assets, filed inaccurate documents with the trial court and documents that impeded plaintiff from discovering the assets. The trial court did address hidden or dissipated assets in its ruling on the Motion for New Trial. As noted, the amount of any such assets was never ascertained. However, even if the court found such hidden assets, it is not compelled to award sanctions. Consequently, it cannot be said that the trial court committed clear error in denying sanctions.

Finally, defendant asserts that the trial court erred in preserving support arrearages. We disagree.

MCR 3.207(C)(5) provides that "A temporary order remains in effect until modified or until entry of the final judgment or order." Further, MCR 3.207(C)(6) states:

A temporary order not yet satisfied is vacated by the entry of the final judgment or order, unless specifically continued or preserved. This does not apply to support arrearages that have been assigned to the state, which are preserved unless specifically waived or reduced by the final judgment or order.

In the present case, the Judgment of Divorce provided that "any amount owed as a result of any temporary order is preserved and is payable forthwith." A separate provision specifically addressed arrearages and stated that all arrearages were preserved and were to be paid in compliance with a schedule provided by the Friend of the Court.

Defendant asserts on appeal that after he objected to the referee's temporary order, the parties agreed to a lesser amount of support before the court could rule on defendant's objection. Defendant cites no record evidence in support of this contention. In contrast, plaintiff testified at trial that she agreed to accept a lesser amount of support from defendant "for a few months" because defendant was having financial difficulty. Plaintiff testified that the arrangement was supposed to be temporary. In light of plaintiff's testimony, we cannot conclude that the trial court erred in preserving the support arrearages. No court order was ever entered indicating that the referee's order was modified. Further, defendant's argument regarding the arrearages is wholly dependent on the existence of the alleged agreement with plaintiff. Absent any evidence of the existence or nature of that agreement, it would be improper to find that the trial court erred.

We affirm the trial court's decision to admit Alfonsi's testimony, as well as the court's denial of plaintiff's request for sanctions. We vacate the trial court's decisions regarding spousal support, alimony in gross, child support and attorney fees. On remand, the trial court is instructed to make the necessary factual findings before recalculating the awards in question. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens